IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Misc. Appl. No.343 of 2005

WITH

Criminal Misc. Appl. No. 344 of 2005

Date of decision: - 11.07.2005

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Initials of Judge

Date:- 11.07.2005

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

CRIMINAL MISC.APPLICATION NO. 343 OF 2005

Sumit Mehra S/o Sri S.P.Mehra
R/o 41, Sewak Ashram Road,
Dehradun.....Applicant

VERSUS

1. State of Uttaranchal----------
2. Ghanshyam Tripathi S/o late Sri M.D. Tripathi
   R/o 35 Rajpur Road, Dehradun

.....Respondents

WITH

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   R/o 35 Rajpur Road, Dehradun

.....Respondents

Hon'ble J.C.S. Rawat, J.

1. Heard Sri L.K. Tiwari learned counsel for the applicant and Sri R.P. Nautiyal learned counsel for the respondent no.2 and perused the record.

2. This is a petition u/s 482 Cr.P.C. for setting aside the order-dated 20.3.2004 passed by the Judicial Magistrate, CBI, Dehradun in criminal case no.308 of 2004 and 280 of 2004.

3. The brief facts relating to this case are that the complainant filed complaint against the respondent no.2 for an offence punishable u/s 138 Negotiable Instrument Act before the competent court at Dehradun. It is alleged in the complaint that respondent no.2 issued a cheque for Rs.2 lacs in consideration of the complainant's investment and his share of profit. He assured the encashment of the same on presentation. On presentation the bank dishonoured the cheque. Notice was given to respondent no.2 and thereafter a complaint was filed. Summonses were sent to the accused and the accused applicant appeared before the court. Before recording his statement u/s 251 Cr.P.C. the respondent no.2 filed an application praying that the partnership deed may be directed to be produced before court so that he can peruse the said deed. The complainant objected to it. The learned trial court passed the impugned order directing the complainant-applicant to produce the said document before the court below.

4. The learned counsel for the complainant contended that the order is bad in law and the impugned order does not indicate that the court was satisfied that it was necessary and desirable for the purpose of the case. It was further contended that the respondent no.2 has not alleged in his application before the trial court that the said document is in possession of the complainant and it was further contented that the accused at the stage of statement under section 251 Cr.P.C. cannot ask the complainant to produce the papers which may be used in defende. The accused will have an opportunity to adduce his

evidence or to summon the evidence in his defence. The learned counsel for the respondent no.2-accused contended that the said document was not asked to be produced in defence but only to refresh the memory of the accused so that he may give his statement before the trial court. It was further contended that the said document was in possession of the complainant. Even it is not alleged in the application that the document is in possession of the complainant it can be inferred that it was in possession of the complainant. The learned counsel further contended that the accused has a right at the stage to peruse those documents, which are in possession of the complainant. It is not necessary that he can use those documents in defence.

6. Section 91 Cr.P.C. reads as under:

> "Summons to produce document or other thing___(1) Whenever any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this Code by or before such Court or such officer, such Court may issue a summons or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons or order."

(2).....

(3).....

7. If section 91 Cr.P.C. is to be attracted the court has to be satisfied that the document is necessary or desirable for the purpose of investigation, inquiry, trial

or any other thing and secondly it is also required under the above section that the document must be in possession of the other party. Any document or other thing as indicated in the aforesaid section can be directed to be produced on finding that the said document is necessary or desirable for the purpose of the case. It has not been alleged in the said application that the said document is necessary or desirable for the purpose of trial and no affidavit has been filed alongwith the application. In absence of such averment in the application it cannot be said that the said document was necessary or desirable for the purpose of the case. It was also incumbent upon the learned Magistrate to give a finding with regard to the desirability and necessity of the document for the purpose of the case.

8. It is also essential to invoke the jurisdiction of section 91 Cr.P.C. the accused cannot make any request to the court at the initial stage while recording the statement of the accused to produce any document, which can be used at the stage of defence. The power of the Magistrate is unfettered whereas it has been conferred u/s 91 Cr.P.C. to summon a document from a party but there are inbuilt inherent limitations as to state or point or time for its exercise. Commensurately with the nature of proceedings as also the conclusions of necessity and desirability to fulfill the tasks or achieve the object. The accused has no right to ask to produce any document at the stage of statement of the accused. The court has only to record the statement under section 251 Cr.P.C. and he can only indicate as to whether he has committed an offence as

indicated in the statement or not. Thus, I am of the view that the accused has no right at the stage of section 251 Cr.P.C. to summon the document from the other party under section 91 Cr.P.C.

9. I am forfeited with the view taken by Apex Court in the case of **State of Orissa Vs. Debendra Nath Padhi, AIR 2005 Supreme Court 359.** It is also pertinent to mention here that section 91 Cr.P.C. specifically indicate that the document must be in possession of the other party. In the application filed before the court below the accused has not mentioned that the said document was in possession of the complaint exclusively.

10. In view of the above discussion I am of the view that the learned Magistrate has erred in directing the complainant to produce the document as indicated in the impugned order and the impugned order is liable to be set aside.

11. Both the applications under section 482 Cr.P.C. are allowed and the impugned order dated 20.3.2004 passed in criminal case no.308 of 2004 and 280 of 2004 is quashed. However, the accused-respondent may file an application before the court below to summon the said document from the possession of the party who had the document at the stage of defence (after recording statement under section 313 Cr.P.C.) and the court may pass appropriate order in this regard.

(J.C.S. Rawat J)

Dated :July 11, 2005

MPS